Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

**October Term, 1979**

**No. 79-343**

SUN SHIP, INC.

*Appellant*

*v.*

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD, JOHN APRIL, CURTIS L. FIELDS, FRANK JANUZCIEWICZ, JOSEPH KIMMEL and WILLIE MOORE.

*Appellees*

# BRIEF FOR THE APPELLEES

ON APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

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COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD, JOHN APRIL, CURTIS L. FIELDS, FRANK JANUZCIEWICZ, JOSEPH KIMMEL and WILLIE MOORE, *Appellees*

# BRIEF FOR APPELLEES

On Appeal From the Commonwealth Court of Pennsylvania

## OPINIONS BELOW

The opinion of the Commonwealth Court of Pennsylvania (J.S. App. pp. A1-A10) is officially reported at 41 Pa. Commw. 302 and unofficially reported at 398 A.2d 1111. The opinions of the Pennsylvania Workmen's Compensation Appeal Board (J.S. App., pp. A18-A53) and the referees' decisions (J.S. App., pp. A54-A72) are not reported.

## JURISDICTION

The order of the Commonwealth Court of Pennsylvania was entered on March 16, 1979. (J.S. App., pp. A8-A10). Appellant Sun Ship, Inc., filed petitions for

allowance of appeal from this order with the Pennsylvania Supreme Court which were denied by that court on June 4, 1979. (J.S. App., pp. A11-A15). On July 19, 1979, Sun Ship, Inc., docketed a notice of appeal to this Court with the Commonwealth Court (J.S. App., pp. A16-A17) and filed its Jurisdictional Statement on August 31, 1979. Probable jurisdiction was noted on January 7, 1980.

The jurisdiction of this Court rests upon 28 U.S.C. §1257(2) because this appeal draws in question the validity of the application of the Pennsylvania Workmen's Compensation Act as being repugnant to the Constitution and laws of the United States and a decision of the Commonwealth Court is in favor of the validity of the application of the state statute.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

1. United States Constitution, Art. III, §2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

2. United States Constitution, Art. VI, cl. 2:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof;



and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Section 2(3), Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1424, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251, 33 U.S.C. §902(3).

When used in this chapter —

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

4. Section 3, Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1424, *as amended by* Pub. L. No. 92-576,86 Stat. 1251, 33 U.S.C. §903:

COVERAGE

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel). No compensation shall be payable in respect of the disability or death of --

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

5. Section 5(a), Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1424, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251, 33 U.S.C. §905(a):

EXCLUSIVENESS OF LIABILITY

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.



6. Section 101, Pennsylvania Workmen's Compensation Act, Act of June 2, 1915, Pub. L. 736, No. 338, *as amended,* Pa. Stat. Ann. tit. 77, §1 (Purdon):

SHORT TITLE; APPLICATION OF ACT

That this act shall be called and cited as The Pennsylvania Workmen's Compensation Act, and shall apply to all injuries occurring within this Commonwealth, irrespective of the place where the contract of hiring was made, renewed, or extended, and extra-territorially as provided by section 305.2

## COUNTER-STATEMENT OF QUESTION PRESENTED

Whether Congress, by its 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), preempted state jurisdiction under a state statute such as the Pennsylvania Workmen's Compensation Act (PWCA), with respect to claims falling within the coverage of the LHWCA and state law.



## COUNTER-STATEMENT OF THE CASE

Claimant-Appellees were injured during the period from 1973 through 1975 in the course of their employment with appellant Sun Ship, Inc. Each claimant sustained a facial disfigurement, which is compensable under the Longshoremen's and Harbor Workers' Compensation Act[1], 33 U.S.C. §908(c)(20), and under the Pennsylvania Workmen's Compensation Act[2], Pa. Stat. Ann. tit. 77, §513(c)(22). While the maximum award for that type of injury under the LHWCA is $3,500, the Pennsylvania Act permits payment of an amount up to $66,825 (275 weeks at $243 per week) in compensation for serious and permanent disfigurement. Moreover, contested disfigurement claims under the LHWCA may take up to 18 months to process, while a state claim may be adjudicated in six to eight weeks. Therefore, an injured claimant may be substantially advantaged by proceeding under state law in situations involving facial disfigurement.

Each claimant sought compensation under the Pennsylvania Workmen's Compensation Act. Their claims were sustained by the Pennsylvania Workmen's Compensation Appeal Board, which rejected Appellant's contention "that jurisdiction under the Pennsylvania Workmen's Compensation Act . . . ha[d] been preempted by the 1972 amendments to the Federal Longshoremen's and Harbor Workers' Compensation Act. . . ." Jurisdictional Statement, p.A.19. The Commonwealth Court of Pennsylvania sustained the Board's jurisdictional ruling, and the Pennsylvania Supreme Court denied Appellant's petitions for allowance of appeal. Sun Ship thereafter filed its appeal in this Court. Jurisdictional Statement, pp. A16-A17.

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1. Act of March 4, 1927 ch. 509, 44 Stat. 1424, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251, 33 U.S.C. §901 *et seq.*

2. Act of June 2, 1915, Pub. L. 736, No. 338, *as amended*, Pa. Stat. Ann. tit. 77, §1 *et seq.* (Purdon).

## SUMMARY OF THE ARGUMENT

There has been no preemption of the exercise of state jurisdiction pursuant to the PWCA by the passage of the 1972 amendments to the LHWCA to claims of injured maritime workers falling within the coverage of both Acts. At issue is whether an injured worker who suffers a work-related injury which would be compensable under either the PWCA or the LHWCA may elect which remedy to pursue, if there is concurrent jurisdiction.

The claimants in the case at bar suffered serious and permanent facial disfigurements. A claimant under the PWCA may receive up to 275 weeks of compensation for disfigurement. The maximum allowable rate per week under the PWCA is $243. Contested claims for disfigurement under the PWCA usually take six to eight weeks for adjudication.

The LHWCA permits a maximum award for facial disfigurement of $3,500. Adjudication of the case before an Administrative Law Judge takes approximately eighteen months. There are clear advantages for claimants with facial disfigurements to proceed under the PWCA as opposed to the LHWCA.

The Commonwealth Court of Pennsylvania correctly applied the legal precepts of this Court concerning preemption and concurrent jurisdiction.[3] The principle of concurrent jurisdiction between the state act and the LHWCA was clearly sanctioned and articulated by this Honorable Court in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962). This Honorable Court held that the uniform application of the LHWCA does not require maritime employees to give up those rights to more favorable compensation payable under state acts. This Honorable Court has recognized the existence of con-

3. *Rice v. Santa Fe Elevator Corp.*, 33 U.S. 218, 230 (1947); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962).



current jurisdiction of state remedies in certain areas which were seaward of the "line" delineated in *Southern Pacific Co., v. Jensen*, 244 U.S. 215 (1917). A correct application of the holding in *Calbeck v. Travelers Insurance Co., supra*, negates the concept that the *Jensen* "line" should advance or recede because this Honorable Court had permitted state remedies in areas seaward of that "line".

Appellants urge that *Calbeck* was negated by the 1972 amendments to the LHWCA. Appellant is confusing uniformity with exclusivity. The 1972 amendments did not change the law as established in *Calbeck*. This is not the first time that an employer has raised this argument. Each time this argument has been made by an employer in the courts it has been decided against the employer. Other courts in other jurisdictions have decided this issue and have held that concurrent jurisdiction exists.[4]

In *Murray v. City of Augusta*, 394 A.2d 1171, 1173 (Me. 1978), Justice Archibald, for the Supreme Court of Maine, wrote:

> In 1972 the LHWCA was amended to extend its jurisdiction to include persons engaged in maritime employment "including a ship repairman, shipbuilder and shipbreaker." 33 U.S.C.A. §902(3). We will not presume a preemption by the federal government since the amendments to LHWCA does [sic] not contain such definitive language that we can infer a congressional attempt to preempt ju-

4. *Umbehagen v.Equitable Equipment Co.*, 329 So. 2d 245 (La. Cir. Ct. App.), *writ of review denied for lack of final judgment*, 333 So. 2d 241 (La. 1976); *Poche v. Avondale Shipyards, Inc.*, 339 So. 2d 1212 (La. 1976), *appeal dismissed for want of jurisdiction sub nom. Territo v. Poche*, 343 U.S. 803 (1977); *Johnson v. Texas Employers Insurance Ass'n*, 558 S.W.2d 47 (Tex. Civ. App. 1977); *Murray v. City of Augusta*, 394 A.2d 1171 (Me. 1978); *Newport News Shipbuilding & Dry Dock Co. v. Director*, 583 F.2d 1273 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979).

risdiction over all injuries occurring in the covered areas. *Johnson v. Texas Employers Insurance Association*, Tex. Civ. App., 558 S.W.2d 47, 50-52 (1977). The Act contains no language that demonstrates (1) it was the clear and manifest purpose of Congress to preempt the field, or (2) that the exercise of dual authority is repugnant to the congressional objective. *Poche v. Avondale Shipyards, Inc.*, La., 339 So.2d 1212, 1218 (1973). 394 A.2d at 1173.

The leading commentators and authorities in this field who have dealt with the question of whether there is concurrent jurisdiction after the promulgation of the 1972 amendments have decided that there is concurrent jurisdiction and no preemption.[5]

The 1972 amendments to the LHWCA do not erase coverage of the PWCA to injuries normally covered. Absent federal preemption and any fatal conflicts between the statutory schemes, a state may constitutionally exercise its police powers respecting maritime activities concurrently with federal jurisdiction. *Askew v. American Waterways Operators*, 411 U.S. 325 (1973).

> While Congress has extended the Admiralty jurisdiction beyond the boundaries contemplated by the framers, it hardly follows from the constitutionality of that extension that we must sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the States. . . .
>
> Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law. 411 U.S. at 341.

5. G. Gilmore and C. Black, *The Law of Admiralty* 425-426 (2d ed. 1975); 4 Larson, *The Law of Workmen's Compensation* §89.70 (1978); Larson, *The Conflicts Problem Between The Longshoremen's Act and State Workmen's Compensation Acts Under the 1972 Amendments*, 14 HOUSTON L. REV. 287 (1977); Watson, *Broadened Coverage Under the LHWCA*, 33 La. L. Rev. 683, 694-95 (1973).



## ARGUMENT FOR APPELLEES

### I. The Conclusion of the Commonwealth Court of Pennsylvania That Pennsylvania May Constitutionally Apply Its Workers' Compensation Law to Grant Relief to Shipyard Workers Is Clearly in Accordance with the Law of This Court As Well As the Intent of Congress in Promulgating the 1972 Amendments.

It is the stated policy of this Honorable Court to show respect for the rightful independence of the states within the Federal system. Effectuation of this policy dictates the construction of Federal statutes in such a way as to preserve the authority of the states to regulate conduct within their borders affecting their citizens, notwithstanding Federal regulation of the same conduct. This policy has prevailed in particular where the conduct had traditionally been subject to state law before Federal authority was extended over it.

At the same time, this Court has recognized that workers' compensation legislation is enacted primarily for the benefit of injured workers and their families, and "should not [be] readily interpret[ed]. . . so as to cut off an employee's right to sue under other legislation passed for his benefit." *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. 622, 628 (1947).

Although we must be mindful of the unyielding nature of the Supremacy Clause, once the circumstances necessary to its invocation are found, Federal laws are construed so as to leave room alongside them for the operation of state laws, unless a contrary congressional intention is manifest.[6]

6. *DeCanas v. Bica*, 424 U.S. 351, 356-63 (1976); *Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *Kesler v. Department of Public Safety*, 369 U.S. 153, 166-74 (1962); *Kake Village v. Egan*, 369 U.S. 60, 63-64 (1962); *cf. Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959); *Davis v. Washington Department of Labor & Industries*, 317 U.S. 244 (1942).

After considering the argument that federal remedies should be provided for maritime employees' injuries on land, because state remedies were generally inadequate, this Court pointed out that legislative action was called for and not judicial action. *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1972), *reh. denied*, 404 U.S. 1064 (1972). Congress, in 1972, without extending the boundaries of the general applicability of maritime tort law, or the admiralty jurisdiction of the Federal Courts, provided a stop-gap federal workers' compensation remedy.

The LHWCA, even with its amendments, is not a pervasive and comprehensive plan of federal regulation. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). It does not provide anything approaching a comprehensive scheme of rights and liabilities to replace the diverse state laws applicable to injuries covered. Exclusive federal jurisdiction was not provided in recognition of the inadequacy of the LHWCA to supplant state remedies. The concerns of federalism and the inadequacy of the LHWCA to replace existing state remedies with a comprehensive statutory scheme requires that the disruption of the application of state law to injuries outside the general application of Federal maritime law be kept to a minimum.

## II. The Supremacy Clause of the Constitution Precludes the States from Enforcing Its Legislation When Congress Has Preempted the Field.

The parties are in agreement that the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, permits Congress to preempt a field with a uniform, comprehensive statutory scheme which is national in scope.

Congressional purpose to preempt state regulation in a particular area is established where (1) the scheme of federal regulation is so pervasive as to make reasonable the inference that Congres left no room for the states to supplement it; (2) the federal statute touches a



field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject; or (3) a purpose to exclude state control is revealed by the object sought to be obtained by the federal law and the character of obligations imposed by it. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978).

No congressional purpose to preclude state regulation in this particular area can be read from the 1972 amendments to the LHWCA. Although the appellees agree that Congress can preempt a field, they disagree with the later contention of Appellant that Congress, by the passage of the 1972 amendments to the LHWCA, preempted state regulation in providing compensation to injured workers.

## III. The Basic Nature of Maritime Law Does Not Require National Uniformity Moreso Than Any Other Field of Law.

Appellant argues that there is something "unique" about maritime law which demands that there be national uniformity. Brief for Appellant at 15. Appellant implies, citing *Southern Pacific Co. v. Jensen*, 244 U.S. 215 (1917), that the "unique" nature of maritime law requires exclusive federal jurisdiction over this entire body of law. This Honorable Court, however, has settled this issue in *Calbeck v. Travelers Insurance Co., supra,* by ruling that there was concurrent and not exclusive jurisdiction.

## IV. The Language of the 1972 Amendments to the LHWCA Shows No Intention to Establish an Exclusive System of Compensation for Maritime Workers.

The wording of the 1972 amendments, appellant argues, establishes a uniform and exclusive system of compensation for maritime workers. Brief for Appellant

at 19. This Court's prior cases indicate, however, that when a state's exercise of its police power is challenged under the Supremacy Clause, the Court starts with the assumption that the historic police powers of the States are not to be superseded by a Federal act unless that was the "clear and manifest purpose of the Congress." *Rice v. Santa Fe Elevator Corp., supra* at 230.

There was no "clear and manifest purpose of Congress" to preempt state regulation in the 1972 amendments to the LHWCA. There was nothing in those amendments which purported to change state jurisdiction over maritime workers' injuries. In order to flesh out some form of argument from the language of the 1972 amendments, Appellant has had to argue from definitions, minor language changes, and the like. But the substance of their position never materializes because the necessary ingredient is absent: no clear Congressional intent is present. Professor Larson summarized this Court's approach to appellant's argument by stating: "Especially when Congress has moved into an area formerly occupied by State Legislation, preemption would not be presumed."[7] This well-established principle that preemption will not be presumed was perhaps best stated in the leading case of *Rice v. Santa Fe Elevator Corp., supra:*

> Congress legislated here in a field which the States have traditionally occupied. [Cites omitted]. So we start with the assumption that the historic police powers of the States were not be to superseded by the Federal Act unless that was the clear and manifest purpose of Congress. 331 U.S. at 230.

In view of the fact that since 1922 this Court has permitted maritime workers to recover under state workmen's compensation statutes, any change in that law by

7. 4 Larson, *The Law of Workmen's Compensation* §89.70 at 16-285 (1978); See, also, *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611 (1928); *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749 (1941).



Congress must be clear, unequivocal, and not open to interpretation. *See Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922).

At the time of the 1972 amendments, we had had an uninterrupted period of a half century in which state workmen's compensation statutes were held applicable to injuries suffered by maritime workers. In view of this, it is certainly elementary that if Congress wanted to eliminate the jurisdiction of such tribunals it would have done so clearly, concisely, and in language that was beyond any doubt. It is inconceivable that Congress would obfuscate its intention to radically change and eliminate concurrent state jurisdiction which had existed for fifty years.

Appellant cites Section 5(a) of the LHWCA, 33 U.S.C. §905(a) to bolster its argument that the "exclusivity" language bars any claim under state workers' compensation acts:

> *The liability of an employer* [to pay compensation under this Act] *shall be exclusive and in place of all other liabililty of such employer to the employee . . .* Brief for Appellant at 23.

This exact language appeared in the original Act as enacted on March 4, 1927.[8] It prohibits an injured employee from bringing a Common Law action against his employer for negligence.[9] Section 5(a) is simply irrelevant to thie issue under discussion. As this Court said in *Davis v. Washington Department of Labor & Industries*, 317 U.S. 249, 256 (1942):

> Nor can we gain any assistance in this circumstance from the clause in the federal act which

8. Act of March 4, 1927 ch. 509, 44 Stat. 1424.

9. *Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973), *cert. denied*, 414 U.S. 1071 (1973); *Keller v. Dravo Corp.*, 441 F.2d 1230 (5th Cir. 1971); *Hughes v. Chitty*, 283 F. Supp. 734 (E.D. La. 1968), *aff'd*, 415 F.2d 1150 (5th Cir. 1969); *Bynum v. The S.S. Mormacteal*, 188 F. Supp. 763 (E.D. Pa. 1960).

makes that act exclusive. 33 U.S.C. §905. That section gains meaning only after a litigant has been found to occupy one side or the other of the doubtful jurisdictional line, and is no assistance in discovering on which side he can properly be placed.

## V. There Is No Significance to the Deletion in 1972 of the Language in Section 3(a) Relating to Recovery Provided by State Law.

Prior to 1972, Section 3(a) of the Longshoremen's Act provided in part as follows:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) *and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.* (Italics supplied).

In the 1972 version of LHWCA, the above italicized portion of the section was omitted. Appellant would ascribe meaning and significance to the elimination of this language. This deletion, however, had no significance whatsoever in view of the law as it existed in 1972.

Indeed, the argument should be made that the elimination of the phrase "and if recovery for the disability or death through workmen's compensation proceeding may not validly be provided by State law" simply means that compensation will be payable under the LHWCA even if a claimant would be entitled to apply for benefits under state law. Parenthetically, it should be noted that there is no danger of a double recovery for a claimant. Section 14(k) provides an employer may receive credit for advance payments of compensation. 33 U.S.C. 914(k). The Benefits Review Board has found credit can be given an employer for payments made under a state compensation act. *Adams v. Parr Richmond Terminal Co.*, 2 BRBS 303 (1975); *Ferch v. Todd Shipyards Corp.*, 8 BRBS 316 (1978).



In order to understand fully the significance of the original language of the clause under discussion, and the lack of significance in its omission, a short historical review is required. The origin of the language finds its roots in the case of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), which involved a longshoreman who was injured while working over navigable waters. There was no federal act at the time and as a result the longshoreman applied for compensation under the New York State Act. This Court held that Article III, Section 2 of the U.S. Constitution granted the Federal Government exclusive jurisdiction over admiralty matters and therefore prohibited the state from legislating on any matter which could be covered by federal law. Congress made several ineffectual efforts to permit the states to have jurisdiction over employees on navigable waters, but this Court aborted all such legislative efforts. *See, e.g., Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. Dawson & Co.*, 264 U.S. 219 (1924). In 1927 Congress enacted the Longshoremen's and Harbor Workers' Compensation Act (Longshoremen's Act), 33 U.S.C. §901 *et seq.* When it enacted that law, Congress limited recovery to injuries which occurred "upon the navigable waters of the United States" and further limited recovery to situations only "if recovery for the disability or death" could not validly be provided by state law.

This Court, in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962), completely eliminated the requirement that in order for there to be recovery under the Federal Act, there had to be a situation not "provided by State law." In *Calbeck*, there were two welders who were injured while working on the construction of new vessels that were floating on navigable waters. The claimants were engaged in "maritime-but-local" types of oc-

cupation and entitled to State Workmen's Compensation. Theoretically, with a strict reading of the specific language of the Longshoremen's Act, they would not be entitled to compensation under the Federal law. However, they did apply for Federal compensation, it was granted, and such awards were affirmed by this Court.

Justices Stewart and Harlan in their dissent make it quite clear what the majority rule accomplished:

> I think the statute means what it says, and what it has always been thought to mean — namely, that there can be no recovery under the [Longshoremen's] Act in cases where the State may constitutionally confer a workmen's compensation remedy. While the result reached today may be a desirable one, it is simply not what the law provides, 370 U.S. at 132.

There is an excellent statement of the Court's holding in *Calbeck* in Larson, *Law of Workmen's Compensation*, (1978) §89.25:

> To put the matter in blunt terms, the Supreme Court by judicial construction, deleted from the Longshoremen's Act the second condition of coverage "and if recovery . . . through workmen's compensation proceedings may not validly be provided by State law," . . .

Thus, based upon the well-known principle of statutory construction that a legislature knows the law, it is obvious that the elimination of that clause by Congress in its 1972 amendments was simply a recognition of the law. Congress simply phrased the law in the language which had become the law, was clear law, and had been such for the past ten years.

The effort by the Appellant to read a new Congressional intent into the elimination of certain language was clearly an endeavor to read a meaning into a law



that is contrary to every principle of statutory construction. Congress knew what the law was when it enacted the 1972 amendments and Congress omitted the language which it did because the language had been rendered superfluous by the decision of this Court.

## VI. The Legislative History of the 1972 Amendments to the Longshoremen's Act Shows No Evidence of Congressional Intent to Preempt the Field of Maritime Employees' Injuries.

The appellant cites and quotes certain reports which it feels "evidences" the Congressional intent to preempt state law. Brief for Appellant at 39. This material contains no persuasive evidence of such congressional intent. For example, appellant emphasizes with italics that the major purpose of §2318 (the 1972 amendments to the Longshoremen's Act) was to "extend coverage to protect additional workers." Senate Report No. 1125, 92nd Cong. 2d sess. (1972) p.1. Appellees do not deny that a principal purpose of the amendments of 1972 was to "extend coverage" to protect additional workers. But it is a *non sequitur* to state that from this extended coverage the Senate meant to preempt concurrent jurisdiction.

There is also a section in that Senate Report, which points to the need for the Federal Act to be extended to cover workers who "might be uncovered", because the State law did not cover them. Thus, we certainly agree that one of the purposes of the amendments of 1972 was to extend coverage to all maritime workers, especially those who had no remedy under State law. Again this is of no help in considering the issue of the instant case.

Appellant also makes much of the language of the Senate Report which indicates an intention "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. . . ." *Id.* at 12-13. This statement does not

rule out the continuation of concurrent jurisdiction. It was a purpose of Congress to extend the Federal Act to cover maritime workers whether they were injured while actually afloat on navigable waters or whether they were injured while standing on "any adjoining pier, wharf, dry dock . . ." 33 U.S.C. §903(a). However, the intention of Congress to extend and broaden the Longshoremen's Act does not mean that there was intention to deprive a worker of his right to go into a state forum if the benefits provided by the state exceeded the benefits of the Federal Act. There is absolutely no purpose in such limiting legislation. Again, Congressional intent to preempt state jurisdiction in this area of social-welfare legislation must be clear, definite and unequivocal.

## VII. There Is No Valid Federal Interest in Depriving a Maritime Worker of His Right to Compensation Under State Law Where the Benefits Thereof Exceed the Benefits of the LWHCA.

Point VI of Appellant's brief indicates that there is some form of "dominant Federal interest" in providing maritime workers with a sole remedy under LHWCA. It is practically impossible to eliminate the problems of overlapping jurisdiction. Judge Wilkinson in the opinion of the Court below, made an important point on this subject. Discussing Appellant's point that "exclusive federal jurisdiction is necessary to achieve national uniformity in compensating maritime workers," the opinion goes on to say with considerable cogency:

> However, it is clear that the extension of coverage of the Longshoremen's Act limited to land-based activities will not comprehensively cover all maritime activities covered on land; rather, courts must still determine the demarcation line of those areas "customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C. §903(a).



> Thus, the federal scheme is not so pervasive as to cover the entire field of the maritime worker's activity. *Sun Shipbuilding and Dry Dock Co. v. Workmen's Compensation Appeal Board,* 398 A.2d 1111, 1114 (1979).

Exclusion of state coverage is virtually impossible. The present coverage by the LHWCA provides:

> Compensation should be payable under this chapter . . . if the disability or death results from an injury occurring upon the navigable waters of the United States, (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area, customarily used by an employer in loading, unloading, repairing or building a vessel." 33 U.S.C. §903(a).

This definition still leaves the "twilight zone." What is an "adjoining terminal?" The ships unload on a pier and the terminal is 100 feet off the pier inland — is that an "adjoining . . . terminal?" Suppose the terminal is not inland but the employer owns all the land in-between? These questions are only set forth to buttress the point made by Judge Wilkinson that "courts must still determine" when an employee is a maritime worker and when he is not.

The remedial purposes of the Act enable any workman to make his own decision as to the coverage which is best for him. It makes no sense to create a new mass of litigation and precedents as employers try to keep workmen out of the state courts. A decision removing concurrent jurisdiction will only protract the litigation of workers who seek state remedies and are cast out on the ground that the state courts have no jurisdiction. They must then seek a federal remedy and may find that the statute of limitations bars their claim. All of these and many more problems would be multiplied if the present system of concurrent jurisdiction is reversed. On this

point again, Judge Wilkinson makes an excellent observation. After concluding that the federal system has not been written in such fashion to cover "the entire field of the maritime worker's activity" the Judge concluded:

> Similarly, the nature of the subject matter (compensation of injured workers arguably covered within the area of federal jurisdiction) does not demand national uniformity so as to require exclusive federal jurisdiction. Rather because state and federal jurisdiction must meet at some line near the water's edge, the federal interest in providing some compensation to injured workmen would be more nearly served by continuing the concept of concurrent jurisdiction. 398 A.2d at 1114.

The policy considerations for concurrent jurisdiction are supported by the authorities in the field.[10]

In further support of Appellant's contention that there is some form of "dominant Federal interest" in making the Federal remedy for maritime workers' injuries exclusive and depriving the states of jurisdiction, Appellant argues for several pages that the Federal Employer's Liability Act (FELA) 45 U.S.C. §§51-60 is relevant. First and foremost, in order to demonstrate the absurdity of citing the FELA as an example of an exclusive Federal remedy, it should be noted that this Act specifically states:

> The jurisdiction of the courts of the United States under this Chapter shall be concurrent with that of the courts of the federal states. Act of April 5, 1910 36 Stat. 291, 45 U.S.C. §56.

The extent of the concurrency of jurisdiction in FELA cases is demonstrated not only by the specific

10. *Accord*, G. Gilmore & C. Black, *The Law of Admiralty*, 475-26 (2d ed. 1975); 4 A. Larson, *Workmen's Compensation Law*, §89.70 (1978).



Congressional mandate granting state courts jurisdiction but by the fact that even if there is diversity of citizenship and otherwise all the requisites for removal to the federal courts exist, a state action under the FELA *cannot* be removed. See 28 U.S.C. §1445:

> A civil action in any State court against a railroad or its receivers or trustees, arising under Sections 51-60 of Title 45 [the FELA Act], may not be removed to any district court of the United States.

Thus, although Appellant argues that the FELA is a "pertinent example of an exercise of Congressional power to create an exclusive Federal remedy," it is rather obvious that study of the act itself shows it is an excellent example of Congressional power to create concurrent jurisdiction in both the state and federal courts. This is but another example of the beneficient nature of the system designed to compensate employees for injuries wherein Congress desired to give employees the benefit of either state or federal courts depending on the convenience of the employee. Contrariwise, the Appellant in the instant case would deprive injured maritime workers of their rights in appropriate cases to seek the remedy of a state tribunal.

We recognize that when there is a conflict between the FELA and a state law, the federal law governs. However, the issue in the instant case is not a problem of the choice of law but rather concurrency of jurisdiction. On the latter subject, the FELA is a good example of Congressional intent to maintain concurrency of jurisdiction for the benefit of injured employees. This Court originally interpreted the Congressional intent as desiring concurrency of jurisdiction in borderline cases involving maritime workers and that intent still exists.

## VIII. THE GRANT OF CONCURRENT JURISDICTION IN BORDERLINE CASES CREATES NO CONFLICT WITH THE LWHCA

In Point VII, Appellant takes the position that the language of the LWHCA is crystal clear, free from doubt, and any employer knows instantly whether the injury is covered by the Longshoremen's Act. Actually, as has already been discussed in some detail, this is not true. The reality of the situation is that a worker who is engaged in activity in, near or related to a maritime environment may at any given moment, when injured, be covered by the LHWCA, may be limited solely to the state workmen's compensation remedy, or may be within coverage of both the LHWCA and the State Workers' Compensation Act. Of course, the amendments of 1972 to the LHWCA have increased the coverage of that act considerably and therefore have eliminated *some* of the doubtful cases. But the elimination of some doubtful cases will, as is always the case in our law, create other doubtful cases. Any imaginative lawyer can by reading the new law immediately perceive questionable cases. What is an "adjoining . . . marine railway. . . ." If an employee is on a railroad car or locomotive which picks up goods discharged by a ship on the pier, then carries it inland, at what point does the employee cease to be a maritime employee covered by the Longshoremen's Act and become an employee covered by either the State Workmen's Compensation Act or the Federal Employers Liability Act? How long does it take for an area to be used by an employer in loading or unloading a vessel to become an area "customarily used" by the employer for that purpose? Suppose an area is designated by the employer for the loading, unloading or repairing of a vessel and an injury occurs on the first day it is used for that purpose? If an employee is injured in an area before a vessel has arrived or before the building of the vessel begins, which Act is applicable?



As stated in *Davis v. Department of Labor, supra*:

> The very closeness of the cases cited above and others raising related points of interpretation has caused much serious confusion. It must be remembered that under the Jensen hypothesis, basic conditions are factual: Does the state law "interfere with the proper harmony and uniformity of " maritime law? Yet employees are asked to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership. As penalty for error, the injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere. See e.g., Ayres v. Parker, D.C., 15 F.Supp. 447. Such a result defeats the purpose of the federal act, which seeks to give "to these hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation", and the state acts such as the one before us which aims at "sure and certain relief for workmen." 317 U.S. at 254.

## CONCLUSION

For the reasons set forth above, Appellees respectfully submit that the decision of the Commonwealth Court of Pennsylvania should be affirmed.

Respectfully submitted,

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